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of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Y&K Maintenance, Inc.

**File:** B-405310.6

**Date:** February 2, 2012

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Michael H. Ferring, Esq., Ferring & DeLue LLP, and Joseph A. Yazbeck, Jr., Esq., and D. Brent Carpenter, Esq., Yazbeck, Cloran & Bowser, PC, for the protester. Douglas R. Roach, Esq., Ahlers & Cressman PLLC, for SEM Service Co., Ltd., the intervenor.

MAJ Christine C. Fontenelle, Department of the Army, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest of an agency's evaluation of the awardee's proposal under a key personnel experience evaluation factor is sustained where the agency did not evaluate the experience of the awardee's proposed key personnel consistent with the solicitation's stated evaluation criteria.
  2. Protest based on an alleged violation of the Procurement Integrity Act is denied, where, consistent with Federal Acquisition Regulation requirements, the agency investigated the alleged disclosure of information by an agency employee to another offeror and found that the documents provided were publicly available and not procurement sensitive and where the protester has not shown that it was competitively prejudiced.
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### DECISION

Y&K Maintenance, Inc., of Seoul, Korea, protests the award of a contract to SEM Service Co., Ltd., of Seoul, Korea, under request for proposals (RFP) No. W91QVN-11-R-0135, issued by the Department of the Army, for operation and maintenance (O&M) of the Medical Command-Korea (MEDDAC-K) facilities in the Republic of Korea.

We sustain the protest in part and deny it in part.

## BACKGROUND

The RFP, issued under the commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12 as a set-aside for local sources, provides for the award of a fixed-priced contract for O&M services and related functions at Army medical facilities located throughout the Republic of Korea for a 1-month phase-in period, a base year, and 4 option years.

A detailed performance work statement (PWS) was provided that requires the contractor to, among other things, meet the accreditation standards of The Joint Commission (TJC) and ensure that all MEDDAC-K medical facilities maintain TJC accreditation at all times.<sup>1</sup> See RFP, PWS, at 8-9, 26; see also RFP amend. 1, at 2-4; Agency Report (AR), Tab 16, Source Selection Decision, at 5. As relevant here, MEDDAC-K facilities comprise the Brian Allgood Army Community Hospital in YongSan, Korea, as well as dozens of Army medical, dental, optometry, and veterinary clinics across South Korea. See RFP, Technical exhib. TE-1-0001, MEDDAC-K Facilities, at 1-2; AR, Tab 16, Source Selection Decision, at 5. The contractor will also be required to provide monthly reports in this regard detailing on-going compliance with TJC's Comprehensive Accreditation Manual for Hospitals. See PWS, attach., Technical Exhib. TE-1-006, TJC Reporting Requirements.

Offerors were informed that award would be made on a lowest-priced, technically acceptable basis considering the following evaluation factors: management, experience, technical, past performance, and price. See RFP at 89-92. The RFP identified prime contractor experience and key personnel experience as subfactors under the experience factor. See id. at 89-91.

With respect to the key personnel experience subfactor, the RFP required offerors to propose (and the PWS requires the contractor to provide) a project manager, alternate project manager, quality control manager, and area manager/foreman, each with varying minimum amounts of continuous years of TJC experience within the last 10 years from the issuance date of the RFP. Id. at 81-82; RFP amend. 1 at 4-6. As relevant here, area managers/foremen were required to have a minimum of 4 continuous years of experience "working at a TJC accredited hospital."<sup>2</sup> RFP amend. 1, at 5. In this regard, The RFP instructed offerors

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<sup>1</sup> TJC is an independent organization that accredits health care organizations (HCO) and programs in the United States, including Department of Defense hospitals located overseas, consistent with United States laws, regulations, and medical practices. See [www.jointcomission.org](http://www.jointcomission.org); see, e.g., Y&K Maint., Inc., B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 2.

<sup>2</sup> The RFP defined "hospital" under the prime contractor experience evaluation subfactor as a facility that provides sleeping facilities for four or more occupants and  
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to provide resumes for each Key Personnel documenting that they actually worked in a TJC accredited hospital. Documentation should include, but not [be] limited to, written information on names, dates, locations, facility descriptions, square footage, bed count and contract reference.

RFP at 81, 90. Offerors were advised that resumes would be evaluated with respect to the qualifications and “actual TJC experience level” of key personnel. Id. Offerors were also advised that key personnel experience would be held to a higher standard than prime contractor experience.<sup>3</sup> Id. at 89.

Prior to receipt of offers, two companies filed protests with our Office challenging the terms of the solicitation. J&J Maint., Inc., B-405310, Oct. 17, 2011, 2011 CPD ¶ 238; Y&K Maint., Inc., supra. J&J argued, among other things, that the RFP’s requirement that key personnel demonstrate various minimum years of continuous experience working at a TJC accredited hospital was overly restrictive.<sup>4</sup> See J&J Maint., Inc., supra, at 6-7. The agency defended its key personnel experience requirement, and our office denied this basis of protest. See id.

In response to the RFP, the agency ultimately received four proposals, including that of Y&K (an incumbent subcontractor) and SEM, which were evaluated by the agency’s technical evaluation team (TET). AR, Tab 16, Source Selection Decision, at 4-5. Three proposals, including Y&K’s and SEM’s, were initially rated unacceptable under the key personnel experience subfactor. Id. at 11. Specifically, the TET found that Y&K’s proposed quality assurance manager did not meet the minimum continuous years of experience requirement in quality control at a TJC accredited hospital. Id. at 12. SEM’s proposal was found unacceptable under this

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is occupied by persons who are mostly incapable of self-preservation because of age, physical or mental disability, or because of security measures not under the occupant’s control. RFP at 81, 89-90.

<sup>3</sup> With respect to the prime contractor experience subfactor, the RFP requires that offerors have relevant experience performing O&M services as a prime contractor in a hospital/healthcare facility, irrespective of the facility’s accreditation. See RFP at 81, 90. The RFP defines relevant experience as experience in hospital/healthcare facilities that provide the same or similar services based on the size, scope, bed count, square footage, complexity, contract type, and facility description, as described in the PWS. See id.

<sup>4</sup> Specifically, J&J argued that the requirement that key personnel demonstrate experience working at a TJC accredited hospital was impractical because, according to J&J, only Americans would meet the requirement, but they could only work in Korea for 3 years under the country’s visa limitations. J&J Maint., Inc., supra, at 6-7.

subfactor because its proposed alternate program manager and area manager (the same individual was proposed for both positions) did not meet the minimum requirements for working in a TJC accredited hospital. Id. at 11; Tab 21(A)(2)(2), Awardee Discussions, at 1.

The contracting officer determined that discussions were necessary and informed Y&K and SEM, among other things, that some of their proposed key personnel were unacceptable because they did not demonstrate experience at TJC accredited hospitals. See AR, Tab 16, Source Selection Document, at 11-13; Tab 21(A)(2), Y&K Discussions at 1; Tab 21(A)(2)(2), Awardee Discussions, at 1-2. Revised proposals were received from Y&K and SEM and evaluated as follows:

	<b>SEM</b>	<b>Y&amp;K</b>
Management	Acceptable	Acceptable
Experience	Acceptable	Acceptable
Technical	Acceptable	Acceptable
Past performance	Acceptable	Acceptable
Price	\$13,312,556,086	\$14,957,337,500
<b>OVERALL RATING</b>	<b>Acceptable</b>	<b>Acceptable</b>

AR, Tab 16, Source Selection Document, at 13-16.

Both offerors' revised proposals were found to be acceptable with regard to the key personnel experience factor. See id. at 12-13. Award was made to SEM as the offeror who submitted the lowest-priced, technically acceptable offer, and this protest followed.<sup>5</sup>

## DISCUSSION

### Key Personnel Experience Evaluation

Y&K protests that the Army unreasonably found that the awardee's proposal satisfied the RFP's minimum requirements for key personnel experience at a TJC accredited hospital.<sup>6</sup> Protest at 7-15; Protester's Comments at 3-5. Specifically, the

<sup>5</sup> Y&K does not protest the agency's evaluation of proposals under the management, technical, past performance, or price factors.

<sup>6</sup> Y&K also challenges the Army's evaluation of SEM's proposal under the prime contractor experience factor. See Protest at 7-13. We find no merit to the protester's protest in this regard, as it essentially repeats arguments we denied in its earlier protest with respect to what could be considered relevant prime contractor experience. See Y&K Maint., Inc., supra, at 5. Specifically, Y&K contends that, notwithstanding the RFP's explicit statement that offerors may demonstrate prime  
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protester contends that the awardee's two proposed area managers do not meet the requirement for 4 continuous years of experience working at a TJC accredited hospital.<sup>7</sup> Rather, the protester asserts that the proposed managers only have experience at ambulatory facilities, that is, outpatient clinics. Protester's 1st Supp. Comments at 3-5. Moreover, the protester notes that, although identified ambulatory clinics had at one time been accredited by TJC, the TJC accreditation standards for ambulatory care clinics are different than those for hospitals. Protester's 2<sup>nd</sup> Supp. Comments at 2.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the bases for their evaluation conclusions. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. While agencies properly may apply evaluation considerations that are not expressly outlined in the RFP, where those considerations are reasonably and logically encompassed within the stated evaluation criteria, there must be a clear nexus between the stated criteria and the unstated considerations. Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 at 4. Although we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria, undocumented, or not reasonably based. Sonetronics, Inc., B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48 at 2, 3.

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contractor experience irrespective of accreditation, the PWS actually requires the prime contractor to have experience at TJC accredited facilities; according to the protester, only TJC experience is relevant to evaluating the awardee's prime contractor experience. See Protest at 7-13; Protester's Comments at 5-10. As we explained to the protester in our earlier decision, the agency reasonably concluded that it could meet its TJC requirements by requiring offerors to propose key personnel with such experience, while not requiring the contractor itself to have prime contractor TJC experience. See Y&K Maint., Inc., supra, at 5-6. Contrary to Y&K's arguments, the RFP did not require offerors to demonstrate prime contractor experience at TJC accredited hospitals.

<sup>7</sup> Y&K also argues that the 4 years of continuous experience had to immediately precede the issuance of the RFP. Protester's Supp. Comments at 4. We disagree. The protester ignores the RFP's definition of "continuous experiences" as experience that occurred within the last 10 years from the issuance date of the solicitation. RFP at 81. Read as a whole, the solicitation placed offerors on notice that the requirement would be met by showing 4 years of continuous experience during the last 10 years. In other words, insofar as proposed area managers/ foremen were required to show 4 years of continuous experience, that experience could be met by showing experience during any continuous 4 year period during the past decade.

SEM's proposal provides resumes for two individuals that were proposed for its area managers. The first shows experience at the Moody Air Force Base (AFB) Medical Treatment Facility (MTF), Georgia, for 13 years from 1998. The second shows experience at the Cannon AFB MTF, New Mexico, for 3 years from 2008. See SEM's Proposal, Key Personnel Resumes, at 33, 35. The Army contends that this shows that SEM's proposed area managers satisfied the key personnel experience requirements, although the agency acknowledges that the Moody and Cannon AFB MTFs are not currently TJC accredited. Supp. AR at 2. The Army states, however, that the Moody AFB MTF was accredited from 1998 to 2005, and that the Cannon AFB MTF was accredited from 1998-2006.<sup>8</sup> See Supp. AR at 2-3; encl. 1, TJC Accreditations, Cannon AFB, Moody AFB.

As discussed above, the RFP required offerors to propose area managers/foremen who had a minimum of 4 continuous years of TJC experience working at a TJC accredited hospital. RFP amend. 1 at 5-6; RFP at 81-83. Offerors were advised that key personnel resumes would be evaluated to ensure that the offeror proposed personnel that were qualified and had actual experience working at a TJC accredited hospital and, in this regard, offerors were required to provide documentation describing the facilities at which key personnel had worked, including the facility's bed count and square footage. See RFP at 81-83, 89-90.

Here, as the protester points out, SEM's proposal and the resumes provided for its proposed area managers do not show that the awardee's area managers have experience working at a TJC accredited hospital, as required by the RFP. SEM's Proposal, Key Personnel Resumes, at 25, 33-35. Rather, the resumes plainly indicate that each worked at an Air Force MTF. The accreditation certificates for each of these facilities show that they have been accredited by TJC as Ambulatory Health Care facilities, not as hospitals. Supp. AR, encl. 1, TJC Accreditations, Cannon AFB, Moody AFB. TJC has different accreditation standards for hospitals and for ambulatory care facilities, reflecting that hospitals provide for inpatient, confined care, whereas ambulatory facilities do not. See TJC, Hospital Accreditation Standards, 2009, at 470; TJC, Standards for Ambulatory Care, at 402 (ambulatory healthcare is defined as "[a]ll types of health services provided to patients who are not confined to an institutional bed as inpatients during the time services are rendered").<sup>9</sup> Moreover, we note that SEM did not demonstrate in its proposal, as

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<sup>8</sup> According to the Army, the Cannon and Moody AFB MTFs are now accredited by a different external accrediting body, the Association for Ambulatory Health Care, which the Air Force determined was a more appropriate accrediting body for Air Force ambulatory clinics. AR at 2-3.

<sup>9</sup> As noted above, the RFP defined a hospital under the prime contractor experience subfactor as "any facility that provides sleeping facilities for four (4) or more occupants and are occupied by persons who are mostly incapable of  
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required by the RFP, that the facilities at which the proposed area managers had worked were hospitals, and did not include documentation of, among other things, the facilities' square footage and bed count. See RFP at 81, 90.

The record also shows that, even accepting the Air Force MTF facilities as hospitals, one of the awardee's proposed area managers would still not satisfy the RFP's requirements for 4 years of continuous experience at a TJC accredited facility.<sup>10</sup> That is, the resume for the area manager who had experience at Cannon AFB MTF, only shows 3 years of experience at this facility. In addition, the record shows that this facility was not accredited by TJC during the time he was employed there.

As a result, we conclude that the agency did not evaluate SEM's proposed key personnel consistent with the terms of the RFP, and we sustain the protest on that basis. See, e.g., Mechanical Contractors, S.A., B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121 at 4. (protest sustained where agency failed to evaluate certification relevant to RFP's specialized experience subfactor).

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self-preservation because of age, physical or mental disability, or because of security measures not under the occupant's control." See RFP at 81-83, 89-90

<sup>10</sup> We note that, in their earlier protests of the terms of the solicitation, see supra at 3, Y&K and J&J challenged the agency's decision not to accept similar experience for key personnel who had worked in hospitals accredited under the international accreditation standards issued by the Joint Commission International (JCI), the international arm of TJC that accredits hospitals and HCOs outside the U.S. Y&K Maint., Inc., supra, at 5 n.8; J&J Maint., Inc., supra at 6, citing RFP amend. 1, at 3 (Question and Answers). The protesters pointed out that during questions and answers, the agency was asked whether, in order to meet the experience requirements, key personnel experience at a JCI accredited hospital would be accepted as qualifying experience. See id. The agency answered that "[f]or this requirement, [JCI] experience is not to be considered as equivalent to experience at a facility with [TJC] certification." RFP amend. 1, at 3. In its reports submitted in response to the protests, the agency defended its decision not to accept JCI hospital standards as equivalent to TJC standards, insisting that, although there were "substantial similarities" between the two standards and the "overall framework of JCI and TJC accreditation . . . are almost identical[,] . . . due to the differences in some of the particular standards between TJC and JCI accreditation . . . [JCI] accreditation cannot be substituted for [TJC] accreditation[.]" See, e.g., AR B-405310.2, at 14. Now, however, the agency has waived for the awardee the requirement that proposed key personnel have experience working at a TJC accredited hospital, seemingly ignoring any differences between accreditation standards for hospitals, or inpatient care medical facilities, see, e.g., supra, n.9 (RFP's definition of hospital), and ambulatory care, or outpatient, facilities.

## Procurement Integrity Act

Y&K also alleges that an agency employee violated the Procurement Integrity Act by providing information to one offeror, but not to Y&K, and that the agency failed to investigate the potential violation.<sup>11</sup> Protest at 3-5.

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107 (2011), known as the Procurement Integrity Act (PIA), provide, among other things, that “[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(b). FAR § 3.104-3(a) dictates that a contracting officer who receives or obtains information of a possible violation of the PIA must determine if the possible violation has any impact on the pending award or selection of the contractor. If the contracting officer concludes that a violation may impact the procurement, the contracting officer is required to report the matter to the head of the contracting activity (HCA). FAR § 3.104-7(b). The HCA must review the information and take appropriate action, which includes either: (1) advising the contracting officer to proceed with the procurement; (2) beginning an investigation; (3) referring information to appropriate criminal investigative agencies; (4) concluding that a violation occurred; or, (5) recommending to the agency head that a violation has occurred, and void or rescind the contract. Id.

Contrary to the protester’s allegation, the record shows that the agency did investigate the protester’s alleged PIA violation. Here, the Army followed the procedures set forth above in investigating the alleged PIA violation. Upon learning of the allegation, the agency requested further information from MEDDAC-K and also referred the matter to Army’s Criminal Investigation Division (CID). Joint CO’s and Field Attorney’s Statement at 1. The agency determined, after investigating the allegation, that the three documents that were allegedly provided to one of the offerors by an agency official were in fact publicly available documents and not procurement sensitive information.<sup>12</sup> Id. at 1-2. Based on the record of the agency’s

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<sup>11</sup> The alleged disclosure was first brought to the attention of the Contracting Command Korea by the MEDDAC-K Facilities Director, who alleged that another agency employee provided to an offeror (not the awardee) copies of the Joint Commission International Accreditation Standards for Hospitals, as well as MEDDAC-K’s Emergency Operations Plan and Utility Systems Management Plan. See Joint CO’s and Field Attorney’s Statement at 1.

<sup>12</sup> The agency states that the Army CID declined to investigate the allegation after the agency determined that the documents which were alleged provided were not procurement sensitive information and were publicly available. Joint CO’s and Field Attorney’s Statement at 2.

investigation, as described above, we see no basis to conclude that a PIA violation occurred, or that the agency's actions were unreasonable. See The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 4. In fact, in its comments on the agency report, Y&K did not rebut the agency's assertion that it conducted an adequate investigation or that the documents alleged provided were in fact publicly available information. Comments at 3.

In addition, the record does not show that Y&K was prejudiced by any alleged disclosure of the publicly available information. An unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 31. Even where a protester shows an actual or potential violation of the PIA, our inquiry does not end there. Rather, the question becomes whether the alleged PIA violation created an unfair competitive advantage. See, e.g., Unisys Corp., B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 10 (protest that awardee's use of former government employee in preparation of its proposal provided the firm with unfair competitive advantage due to employee's access to proprietary information of the protester denied where record reflects that the information at issue was not competitively useful).

Although Y&K asserts that "there is sufficient evidence in the record to establish a prima facie case of unfair competitive advantage, the protester does not explain how it would be prejudiced by the agency allegedly sharing publicly available information with another offeror who was not the awardee. See Protest at 5-22. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. See, e.g., Special Servs., B-402613.2, B-402613.3, July 21, 2010, 2010 CPD ¶ 169 at 4.

#### Other Protest Allegations

The protester has not shown that it was prejudiced with respect to a number of other protest allegations, which, in any event, we find lack merit. For example, contrary to Y&K's complaint that the agency acted improperly by conducting discussions, the RFP reserved the agency's right to conduct discussions with offerors. RFP at 1-2; see Protest at 15-16. Moreover, the protester cannot show that it was prejudiced in this regard because the agency conducted discussions with all offerors, including Y&K, whose proposals were included in the competitive range. See AR, Tab 16, Source Selection Decision, at 12-16; see, e.g., Tab 21(A)(2), Y&K Discussions at 1; Tab 21(A)(2)(2), Awardee Discussions, at 1-2. To the extent that the protester complains that the agency improperly changed the contract performance period without amending the solicitation, see Protest at 16, the protester again fails to show any prejudice since both Y&K and SEM were afforded an opportunity to revise

their proposals accordingly. AR, Tab 21(A)(3)(2), Y&K Discussions, at 1-2; Tab 21(B)(3)(2), SEM Discussions, at 1.

We also find no merit to Y&K's contention that SEM engaged in an unlawful "bait and switch" with respect to its key personnel. To establish an impermissible bait and switch scheme, a protester must show that a firm either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance, and that the misrepresentation was relied on by the agency and had a material effect on the evaluation results. Data Mgmt. Servs. Joint Venture, B-299702, B-299702.2, July 24, 2007, 2007 CPD ¶ 139 at 10. The protester has not made this showing, nor do we find anything in the record to suggest that an impermissible "bait and switch" occurred.

#### RECOMMENDATION

We recommend that the agency reevaluate proposals under the key personnel experience evaluation criteria consistent with the RFP's criteria and, if necessary, conduct further discussions and obtain revised proposals. If a firm other than SEM is found to offer the lowest-priced, technically acceptable offer, the Army should terminate SEM's contract for the convenience of the government and make award to that other firm. We also recommend that Y&K be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2011). Y&K should submit its certified claims for costs directly to the contracting agency within 60 days after receipt of this decision. Id., § 21.8(f)(1).

The protest is sustained in part and denied in part.

Lynn H. Gibson  
General Counsel